

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Robert E. Bruun,

Petitioner,

FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND RECOMMENDATION

Vs

Crow Wing County,

Respondent.

The above-entitled matter came on for hearing before Steve M. Mihalchick, Administrative Law Judge, on September 13, 1991, in the Crow Wing County Courthouse, Brainerd, Minnesota. Petitioner Robert E. Bruun, 525 5th Street N.E., Staples, Minnesota 56479, appeared on his own behalf. Thomas Fitzpatrick of Fitzpatrick, Larson, Fitzpatrick & Nelson, P.O. Box 631, Brainerd, Minnesota, appeared on behalf of Respondent Crow Wing County. The record closed upon adjournment of the hearing on September 13, 1991.

This Report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record which may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendations contained herein. Pursuant to Minn. Stat. 14.61, the final decision of the Commissioner shall not be made until this Report has been made available to the parties to the proceeding for at least ten days. An opportunity must be afforded to each party adversely affected by this Report to file exceptions and present argument to the Commissioner. Parties should contact Bernie Melter, Commissioner of Veterans Affairs, 2nd Floor, Veterans Service Building, 20 W. 12th Street, St. Paul, Minnesota 55155, to ascertain the procedure for filing exceptions or presenting argument.

STATEMENT OF ISSUES

1. Whether Petitioner was denied any rights under the Veterans Preference Act as a result of Respondent's failure to have in place a system providing veterans preference rights as required by the Act.

2. Whether Respondent would have been hired had Respondent provided veterans preference credits as required by the Act.

3. If Petitioner was denied rights under the Veterans Preference Act,
to what relief is he entitled?

Based upon the record herein, the Administrative Law Judge makes the following:

FINDINGS OF-FACT

1. Petitioner is an honorably discharged veteran entitled to the benefits provided by the Veterans Preference Act and, in particular, Minn. Stat. 197.455 and 43A.11. Respondent is a political subdivision to which those statutes apply.

2. Petitioner retired from the Navy on October 26, 1990, with over twenty years of active duty and a Navy commendation medal. Petitioner's specialty in the Navy was in supply and inventory control. At the time of his military retirement, he was a Fiscal Officer in charge of a staff of about twenty civilians and military personnel performing accounting and budgeting functions with responsibilities of several million dollars, preparing reports for very high level Navy commanders, monitoring procurement of parts and other inventories, supervising an office staff, hiring, firing and disciplining personnel, maintaining cost accounting for equipment inventories, assigning and supervising work of other employees and developing computer programs for such reporting. Petitioner attended but did not complete high school in Staples, Minnesota, and received his G.E.D. while in the Navy.

3. In early 1991, Respondent announced a job opening for the position of Office Administrator - Highway Department. Joint Ex. 1. The vacancy arose because of the retirement of a thirty-year employee who had held the position. The job announcement stated:

Job Description:

Has direct administrative and supervisory responsibility of receptionist and other clerical staff. Must be familiar with current office management and supervisory practices. Ability to perform specific accounting functions, prepare financial reports, analyze specific data and prepare technical reports based on such data. Work is performed under the general direction on the County Highway Engineer.

General Duties:

1. Process revenue receipts, accounts receivable and accounts payable.
2. Maintain control, cost accounting for roads and equipment.
3. Monitoring Road and Bridge fund budget.
4. Maintain all required financial records.
5. Prepare periodic financial and statistical reports.
6. Day to day supervision of office staff.
7. Assigns specific work functions to office staff.
8. Analyze work flow and design and implement procedures and policies to increase effectiveness and efficiency of employees.
9. Analyze fiscal reports and put information into

specific formats.

Knowledge, Ability, and Skills:

1. Knowledge of office practices, procedures and ability to plan, assign and review work of office staff.
2. Ability to evaluate, train and discipline personnel in an effective manner.
3. Ability to prepare administrative reports from technical data.
4. Process revenue receipts, accounts receivable and accounts payable, and inventory control.
5. Responsible for cost accounting for roads, equipment, and county vehicle fleet.
6. Preparation and maintenance of all financial reports and records.
7. Prepare periodic financial and statistical reports.
8. Project cost estimates of department expenditures.
9. Assign and supervise work to other employees.
10. Requires knowledge of rules and regulations, special funding, bond funding, as may be applicable to the Highway Department.
11. Strong background in accounting procedures.
12. Strong background in Data Processing, Word Processing, etc.

Minimum Qualifications:

A combination substantially equivalent to a post secondary degree in Business Administration and or Accounting. Proven management experience and a minimum of four years of actual work experience.

4. The job description had been developed by Siegfried Stier, Respondent's Personnel Coordinator, in consultation with Duane Blanck, the County Engineer. The Highway Department is a forty-six person department headed by the County Engineer. Below the Engineer are the Assistant Engineer, a Maintenance Supervisor in charge of the day-to-day maintenance functions of the Highway Department and the Office Administrator.

5. Petitioner has been seeking full-time employment since his retirement from the Navy. On April 11, 1991, he applied for the Office Administrator position in Respondent's Highway Department. Joint Ex. 2. Petitioner has the knowledge, ability and skills required for the position as set out in the job announcement and meets the minimum qualifications in that his experience is substantially equivalent to a post-secondary degree in Business Administration or Accounting.

6. Stier has been the Personnel Coordinator for Respondent since July 1989. He had previously worked twenty-four years in the Personnel or Human Resource function in private industry. After the April 15, 1991 closing date, Stier personally reviewed the approximately 108 applications that had been received. His purpose was to reduce the number of applications down to a more manageable number to be considered by the Engineer. He did so by reviewing the minimum qualifications of the applicants, He found thirty-eight that he

felt were much above the minimum qualifications set forth in the job announcement. He relied very heavily upon the level of education of the applicants in making that determination. He did not use a point scoring system and did not determine whether the applicants were qualified or not qualified. Petitioner was not among the thirty-eight selected by Stier.

7. Stier's judgment as to the thirty-eight he determined to be much above minimum qualifications was made in good faith and based upon his experience in Human Resources and his knowledge of the position based upon his discussions with Highway Department personnel and review of prior job descriptions.

8. Stier sent all 108 applications, along with all information that had been submitted by the applicants or others on their behalf, to Blanck. The applications were divided into two piles, the thirty-eight selected by Stier and the others. Stier also sent Blanck an alphabetical list of all the applicants on which he highlighted the names of the thirty-eight he was recommending.

9. Blanck received the applications and listing from Stier. He considered the thirty-eight applications separated out by Stier as a "screened down list." He and the Assistant Engineer considered only those thirty-eight applications.

10. Blanck and the Assistant Engineer reviewed the thirty-eight applications closely, particularly looking for strengths in three areas that Blanck considered most critical to the position. First, they looked for a strong accounting background and training because accounting and cost control was the primary function of the position. Blanck considered inventory control to be a part of that accounting function. Second, they looked for strengths in the personnel management and administration area, including experience in payroll, personnel management and similar areas. Third, they looked for some experience in cost accounting and personnel management particularly related to equipment repair and use.

11. Blanck and the Assistant Engineer selected fourteen of the applicants to be interviewed. Under a County policy, existing County employees that apply for a position must be interviewed. Three such existing employees were among the fourteen selected for interview. Apparently, they had also been among the thirty-eight recommended by Stier. Except for those three, the applicants selected for interview were those that Blanck and the Assistant Engineer considered to have the best apparent qualifications for the position as shown by their applications.

12. Blanck gave Stier a list of the fourteen selected for interview and a suggested interview schedule. Stier contacted the individuals to set up those interviews; one declined to be interviewed. Stier then sent letters to all the other applicants, including Petitioner, thanking them for their interest in applying for the position, stating that although they were not

selected for interview they were encouraged to apply for future openings and that their application and resume would be kept on file for future reference. Joint Ex. 3.

13. The remaining applicants were interviewed by Blanck, the Assistant Engineer and the person retiring from the position. Prior to the interviews, they established a framework of the questions they would ask. During the interviews, the questions were asked in a conversational manner. Stier was present during the interviews but did not participate. After the interviews Blanck, the Assistant Engineer and the retiring employee compared notes, discussed the interviewees and selected the one they felt to be the top person. Blanck notified Stier of the person selected. Stier contacted the person, he accepted the offer and started work on July 1, 1991, at the announced starting salary of \$2,307.00 per month.

14. Respondent gave no consideration to veterans preference in the process used to fill the position of Office Administrator. In failing to do so, Respondent followed the normal hiring process that it had followed during the two years of Stier's employment by the County as Personnel Coordinator. Prior to Mr. Stier's employment, the County used the services of the Minnesota Department of Jobs and Training to provide the names of qualified applicants. At least in the Highway Department, the selection process was then the same as that used in filling the position at issue here.

15. Respondent has no system in place to award veterans preference credits as required by Minn. Stat. 197.455 and 43A.11, and apparently never has had such a system in place. Because of the petition in this matter, Respondent is now redesigning its hiring system to comply with the requirements of the Veterans Preference Act.

16. If Petitioner had been provided with a veterans preference credit, he may have been invited for an interview, but he most likely would not have been chosen as the person hired for the position. That selection would have been made by Blanck, as advised by the Assistant Engineer and the person retiring from the position. Blanck was of the opinion, after hearing Petitioner's testimony regarding his military experience and its relevance to the position, that Petitioner's military experience was more relevant than he might have originally thought based on looking at the application alone, that Petitioner might be at a level to be among the thirteen persons interviewed, but that Petitioner would not be at the top of the thirteen and would not have been the one hired.

17. Blanck's determination that Petitioner would not have been the person selected even if he had been interviewed is a good-faith determination. While Petitioner's background provided him with experience in all the areas required for the Office Administrator position, it is not unreasonable for Blanck to conclude that he was not the best qualified for the position. Blanck was particularly looking for someone with a strong background and substantial training in accounting. Petitioner's accounting background is not that strong.

18. There is no evidence in the record indicating whether any of the other persons applying for the position were veterans.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. 14.50 and 197.481.

2. Petitioner is an honorably-discharged veteran entitled to the protections of Minn. Stat. 197.455 and 43A.11.

3. Minn. Stat. 197.455 states that the provisions of Minn. Stat. 43A.11 granting preference to veterans in the state civil service shall also govern preference of a veteran in the counties and other political subdivisions of this state. Minn. Stat. 43A.11 provides, in relevant part:

43A.11 VETERAN'S PREFERENCE

Subdivision 1. Creation. Recognizing that training and experience in the military services of the government and loyalty and sacrifice for the government are qualifications of merit which cannot be readily assessed by examination, a veteran's preference shall be available pursuant to this section to a veteran as defined in section 197.447.

Subd. 3. Nondisabled veteran's credit. There shall be added to the competitive open examination rating of a nondisabled veteran, who so elects, a credit of five points provided that the veteran obtained a passing rating on the examination without the addition of the credit points.

Subd. 7. Ranking of veterans. An eligible with a rating augmented by veteran's preference shall be entered on an eligible list ahead of a nonveteran with the same rating.

Subd. B. Notification. A governmental agency when notifying eligibles that they have passed examinations shall show the final examination ratings preference credits and shall notify eligibles that they may elect to use veteran's preference to augment passing ratings.

Subd. 9. Rejection; explanation. If the appointing authority rejects a certified eligible who has received veteran's preference, the appointing authority shall notify the eligible in writing of the reasons for the rejection .

4. Minn. Stat. 197.46 provides, in relevant part:

Nothing in section 197,455 or this section shall be construed to apply to the position of private secretary, teacher, superintendent of schools, or one chief deputy of any elected official or head of a department, or to any person holding a strictly confidential relation to the appointing officer. The burden of establishing such relationship shall be upon the appointing officer in all proceedings and actions relating thereto.

5. Respondent's method of filling the vacancy for Office Administrator-Highway Department failed to comply with the requirements of Minn. Stat. 43A.11, in that no system for rating qualified applicants on a 100 point scale existed, no credits were added to the scores of qualified veterans, no system existed to rank eligible veterans with a rating augmented by veteran's preference ahead of nonveterans with the same rating, no notice was given to veterans that they may elect to use veteran's preference to augment passing ratings and no system was in place to provide the required notice of the reasons for rejection to veterans who were not hired.

6. Petitioner's rights under Minn. Stat. 43A.11 were violated by Respondent. Petitioner was qualified for the position and should have received a credit that would have increased his standing on the eligible list.

7. The Veterans Preference Act does not guarantee the right to be among the finalists interviewed for a position and provides no preference at all toward being the person selected from among those interviewed. Under Minn. Stat. 43A.11, the effect of the veterans preference credit is to increase the veteran's chances of being high enough on the eligible list to be among the persons called for an interview. After that, the preference disappears. In this case, even if Petitioner had been called for an interview, Mr. Blanck would not have selected him because he, in the good faith exercise of his judgment, would have thought other persons to be more qualified. Thus, despite the fact that Respondent violated Petitioner's right under the Veterans Preference Act, Petitioner was not injured thereby.

8. Petitioner is entitled to nominal damages of \$300.00.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order:

1. That Respondent comply with the requirements of Minn. Stat. 197.455 and 43A.11, in all future hirings not otherwise exempt from those statutes.

2. That Petitioner's request that the Office Administrator hiring be reopened be DENIED.

3. That Respondent pay Petitioner the sum of \$300.00 within thirty days

of the date of such Order.

Dated this 25thday of September, 1991.

STEVE M. MIHALCHICK Administrative
Law Judge

NOTICE

Pursuant to Minn. Stat. 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail.

Reported: Taped. Tape numbers 11,044 and 11,120. Not transcribed.

MEMORANDUM

Veterans preference in employment in political subdivisions has been part of Minnesota law since 1907. Until 1975, veterans had an absolute preference in hiring. In 1975, the statute was modified to require the application of the point credits specified in the statutes as they exist today. Respondent did not comply with any of those requirements until Petitioner filed his petition in this case. Respondent claimed that it was not aware of the requirements until they were clarified by the Supreme Court in *Hill v. City Of Champlin*, 463 N.W.2d 502 (Minn. 1990). But even at that point, Respondent did nothing. It took no action to comply with the law until Petitioner raised the issue in this matter.

Respondent raised the defenses that Petitioner was not qualified for the position and, even if he were qualified, he would not have been selected as the Office Administrator. The actual determination of qualifications is to be made by the County. This issue is addressed by *State ex. rel Meehan v. Empie* 164 Minn. 14, 204 N.W. 572 (1925). At that time, the Veterans Preference Act stated that honorably discharged soldiers were entitled to preference in public employment and that when a vacancy occurred and a veteran applied, the appointing body was required to "make an investigation as to the qualifications of said soldier and if he is a man of good moral character, and can perform the duties of said position," appoint him to the position. As to the matter of determining whether the soldier was qualified, the court stated:

It is the duty of the appointing body to make the investigation prescribed by the statute. That duty is imposed upon it directly. Presumably it will discharge it fairly. The question of qualification or fitness is first and primarily for the appointing body. The trial court on mandamus, or this court on review, cannot

substitute its own view of the fact. Only when the

appointing power declines to investigate, declines to apply the law, or proceeds with manifest arbitrariness, or something equivalent thereto, can relief be had by mandamus. The court does not determine the question of fitness. Evidence of it may be competent in determining whether the appointing body applied the law at all, or, applying it, proceeded with manifest arbitrariness. It is to be assumed that the appointing body will proceed with the investigation, and will be fair. If it chooses otherwise, there is difficulty of enforcement arising from the inherent nature of the subject. It cannot be remedied by the court through an assumption of authority to appoint. Its power is confined within the limits which we have stated.

At the time of that case, a veteran's exclusive remedy for violations of the Veterans Preference Act was to seek a writ of mandamus in district court. Since that time, the jurisdiction of the Commissioner of Veterans Affairs to consider petitions alleging denials of rights under the Veterans Preference Act has been added to the Act. Thus, it is appropriate for the Administrative Law Judge and the Commissioner to address the issue of qualification where it arises in petitions filed under Minn. Stat. 197.481, but that review is limited to determining whether the appointing authority made its judgments in good faith.

In this particular case, Stier did not make any determination as to whether applicants were qualified or not; he merely pointed out those that he felt had qualifications much above the minimums required. Blanck, who testified very credibly, stated that he felt that Petitioner was perhaps qualified enough to be among the thirteen that he interviewed. Thus, by the testimony of its own witnesses, Respondent's argument that Petitioner was not qualified fails. However, Blanck testified just as credibly that in his judgment Petitioner was not among the top few candidates and would not have been the person he selected to fill the position. Even in hindsight and under the conditions of this contested case hearing, that determination was not arbitrary, but was a good faith determination by Blanck.

Because Petitioner would not have been the person selected to fill the position even if he had received the appropriate veterans preference credits, it is not appropriate to order that he be hired into the position. Nonetheless, the County did violate the Veterans Preference Act, Petitioner's veterans preference rights, and the rights of any other veterans who applied for the position.

Minn. Stat. 197.481, subd. 1, states that the Commissioner of Veterans Affairs has the authority to "grant the veterans such relief the commissioner finds justified" by the veterans preference statutes. In a similar case for the Department of Veterans Affairs, Seguin v, City of Duluth, Findings of Fact, Conclusions and Recommendation of the Administrative Law Judge dated September 23, 1991, Administrative Law Judge Peter Erickson concluded that where a statutory violation has been proved but no compensatory damages shown, nominal damages in the amount of \$300.00 should be awarded. Nominal damages are given, not as an equivalent for the wrong, but in recognition of a technical injury and by way of declaring a right, or as a basis for taxing

costs; and are not the same as damages small in amount. 25 C.J.S. Damages 8; Danker v. Iowa Power & Light Co., 249 Iowa 327, 86 N.W.2d 835 (1957). Nominal damages may be recovered where a cause of action for a legal wrong is established, but there is no proof of actual damages. 25 C.J.S. Damages 9. While the amount of \$300.00 is in excess of what has historically been considered as nominal damages, see cases cited at 5C, Dunnell Minnesota Digest, 2d Series Damages 1.03, n. 16, in light of the Commissioner's statutory authority to grant such relief found justified under the statutes, \$300.00 is an appropriate amount for recognizing the technical injury incurred by Petitioner and his efforts in obtaining Respondent's compliance with the Veterans Preference Act. Three hundred dollars is a nominal amount under the circumstances of this case and in today's world.

SMM